Supreme Court, U.S.
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85-1767
No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

GABRIEL ROBERT CAGGIANO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

CORRECTED COPY

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Questions Presented.

Whether the petitioner was denied a fair trial when the judge refused to instruct a confused and deadlocked jury that jurors should not surrender conscientiously held convictions when requested by both the defense and the prosecution but instead sent the jury back with instructions to return a guilty or not guilty verdict.

Whether the petitioner was denied a speedy trial and a fair trial when after long delays, objected to many times, the principal defense witness, known to be seriously ill, dies before trial and where the trial judge refuses to exercise his discretion to admit evidence of the statements of the unavailable witness admissible under Federal Rules of Evidence 804(b)(3).

Whether the petitioner was denied a fair trial when in a one-on-one case depending entirely on witness' credibility the prosecutor introduces perjured testimony and suppresses evidence of witness bias and then, based on that testimony argues to the jury that its witness is worthy of belief and whether on a motion for new trial based on the discovery of the perjury he is entitled to a factual hearing.

List of Parties to the Proceeding.

Nigel Winfield

Gabriel Robert Caggiano

Raymond W. Baszner

J. Laurence Wolfson (deceased)

Table of Contents.

Opinion below 1

Jurisdictional statement 2

Constitutional provisions and statutes 2

Statutory provisions and rules 3

Statement of the case and prior proceedings 4

Argument 10

I. The petitioner was denied a fair trial when the judge refused to instruct a confused and a deadlocked jury that jurors should not surrender conscientiously held convictions when requested by both the defense and the prosecution but instead sent the jury back with instructions to return a guilty or not guilty verdict 10

II. The petitioner was denied a speedy trial and a fair trial when after long delays, objected to many times, the principal defense witness, known to be seriously ill, dies before trial and where the trial judge refuses to exercise his discretion to admit evidence of the statements of the unavailable witness admissible under FRE 804(b)(3) 13

III. The petitioner was denied a fair trial when in a one-on-one case depending entirely on witness' credibility the prosecutor introduces perjured testimony and suppresses evidence of witness bias and then, based on that testimony argues to the jury that its witness is worthy of belief, and whether on a motion for new trial based on the discovery of the perjury he is entitled to a factual hearing 19

Conclusion 24

Appendix follows p. 24

Table of Authorities Cited.

CASES.

Barker v. Wingo, 407 U.S. 514 (1972) 16, 17, 18, 19

Brady v. Maryland, 373 U.S. 83 (1963) 7, 14

Cain v. Smith, 686 F.2d, 374 (6th Cir. 1982) 22

Dickey v. Florida, 398 U.S. 30 (1970) 16, 18, 19

Jenkins v. United States, 380 U.S. 445 (1965) 10

Jenkins v. United States, 330 F.2d 22D (D.C. App. 1964) 12

Jones v. Kentucky, 97 F.2d 335 (6th Cir. 1938) 23

United States v. Bagley, 53 U.S.L.W. 5084, 105 S.Ct. 3375 (1985) 19, 21, 22, 23, 24

United States v. Leja, 568 F.2d 493 (6th Cir. 1977) 21

STATUTES AND PROVISIONS.

Title 18 U.S.C.

§ 2 4

§ 271 4

§ 1341 4

§ 1343 4

§ 2314 3, 4

§ 3161 16

Title 28, Section 1254(1) 2

United States Constitution

Fifth Amendment 2

Sixth Amendment 2, 3, 12, 15, 16, 18

Federal Rules of Evidence

804(b)(3) 3, 4, 13, 17, 18

Supreme Court Rule 17.1(c) 2

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Opinion Below.

The opinion of the Sixth Circuit, reproduced and attached hereto as Appendix A, is unreported. The judgment and sentence of the United States District Court, Western District of Tennessee, was entered on September 8, 1982.

Jurisdictional Statement.

The judgment and the opinion of the Sixth Circuit was entered on December 2, 1985. A petition for rehearing and a petition for rehearing en banc were timely filed and an order denying the petition for rehearing and rehearing en banc was filed January 28, 1986. A copy of that order is attached as Appendix B.

Petitioner invokes the jurisdiction of this Court under Title 28, Section 1254(1) and Supreme Court Rule 17.1(c).

Constitutional Provisions and Statutes.

UNITED STATES CONSTITUTION.

Amendment 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witneses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutory Provisions and Rules.

Title 18, United States Code, Section 2314:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000. or more, knowing the same to have been stolen, converted or taken by fraud; or . . .

Federal Rules of Evidence 804(b)(3):

> . . . . . .
>
> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . . . .
>
> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability,

> or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
>
> . . . . . .

Statement of the Case and Prior Proceedings.

On October 18, 1977, petitioner Gabriel Robert Caggiano of Boston, Massachusetts was charged in a seventeen-count indictment returned by a Federal Grand Jury sitting in Memphis, Tennessee with violations of Title 18, United States Code, §§ 2, 271, 1341, 1343 and 2314. The indictment contained one conspiracy count and sixteen substantive counts sounding in fraud.

The indictment related to the sale, lease back, and sub-lease of a Lockheed Jetstar Aircraft owned by the late Elvis A. Presley. Other named defendants included Frederick P. Pro, J. Lawrence Wolfson, Raymond W. Baszner, Roy Everett Smith, and Philip Karl Kitzer, Jr.

The Government's case was that the various defendants conspired to commit various fraudulent acts against Elvis Presley, all revolving around the sale and lease-back by Elvis Presley, of one of his jet airplanes. Presley's payments on this plane were in arrears and the financing company was pressing him for payment. The airplane, a "Jetstar," would be sold to a leasing company for enough money to pay off the existing debt on the plane, plus additional funds. The leasing company would immediately lease it back to Presley. Presley would then sublease the Jetstar aircraft to Air Cargo Express, a Miami-

based company, which would pay Presley $1,000 a month more than his monthly financial obligation to the leasing company.

Air Cargo Express would use the jet in its own operations and would make mechanical improvements. At the end of the term, the aircraft would be returned to Presley, who would then pay off the leasing company and keep the improved plane.

In May 1976, Gabriel Robert Caggiano, a practicing attorney in the Boston, Massachusetts area since 1956 was retained by World Aircraft Exchange, an aircraft brokerage company, to represent its interest in the company's refinancing of the Lockheed Jetstar aircraft belonging to the late Elvis A. Presley.

While in Memphis on behalf of World Aircraft Exchange, Caggiano was "recruited" by Presley's attorney, Charles Davis (now deceased) to help draft an aircraft lease agreement between Presley and W.W.P. Leasing, a New York financing company. The lease required that the aircraft be upgraded to conform to Federal Aviation Administration standards for commercial aviation.

Caggiano agreed to help and co-authored with Charles Davis the lease as well as a rider to the lease enumerating several clauses aimed at protecting the interests of Presley, among which was a provision that payments would be made by W.W.P. Leasing as work was performed.

When Caggiano delivered the documentation to W.W.P. Leasing in New York on or about July 15, 1976, Hans Achtmann, president of W.W.P. Leasing insisted on shifting responsibility for payment back to Vernon Presley.

Presley agreed to take full responsibility for the upgrading work. He also received a fee of $40,000 from the proceeds of the refinancing. Caggiano received a fee for legal work and was paid by World Aircraft Exchange from its financing fee.

Caggiano was indicted October 13, 1977 and the first trial commenced August 21, 1978. Prior to the first trial, the attorney

representing Vernon Presley refused to allow the defendant or his attorney to interview Presley because of his ill health.

On January 10, 1978, defendant filed a motion for exculpatory material including statements made by potential government witnesses. The motion was granted February 24, 1978. Critical material, including a taped FBI interview of Presley in which Presley exculpated Caggiano was not produced.

During the trial and after his video-taped testimony, Presley visited the defendant and volunteered to testify on his behalf at any subsequent trial. He further promised that he would have his attorney contact the U.S. Attorney's office to have this prosecution dropped as he recognized that Pro was the culprit and that Caggiano was innocent of any wrongdoing. This promised demand was made by D. Beecher Smith to Joe A. Dycus, the prosecutor who failed to report this as exculpatory communication to any defendant.

A mistrial was declared on September 11, after the jury was unable to agree on a verdict. A superseding indictment was obtained on November 16, 1978 and a trial date set for January 15, 1979. The trial was continued from time to time over the defendant's objection and after several motions to dismiss were filed and denied until August 1979. Presley died June 26 after a long illness.

The defendant filed a motion to dismiss on double jeopardy grounds on August 8. This was denied and an interlocutory appeal was taken to the Court of Appeals. The appeal was dismissed on June 13, 1980. A new trial date was not set until January 5, 1981.

In the meantime defendant's attorney, Phil M. Canale, withdrew his appearance and accepted employment with this U.S. Attorney's office. A motion to disqualify that office was allowed within the discretion of the trial judge on the grounds that the appearance of justice would not be served to allow the present employer of Caggiano's former attorney to continue to prosecute him. The government appealed and the Court of

Appeals reversed the trial judge in the exercise of his discretion on the grounds that no prejudice had been shown. A new trial date was set for May 17, 1982 and trial commenced after the denial of Caggiano's further speedy trial claims.

On August 2, 1979, Dycus produced a taped interview between Presley and FBI agents Ronan and Curtis dated March 3, 1977, which statements exculpated Caggiano. This was suppressed during the first trial and was only made available after Presley's death. Not only were the statements of Presley exculpatory, but his understanding of the business transaction was completely at variance with the government's theory upon which the indictment was returned. The motion to dismiss on the ground of government's suppression of *Brady* material was denied.

The government's theory of this case was that this defendant submitted or caused to be submitted misleading invoices to Presley with regard to work allegedly done on the aircraft.

The defendant's position was that the Jetstar transaction was legitimate as planned and would have been of benefit to Elvis Presley had it not been for the fraudulent activity of the chief government's witness, Pro. The government relied heavily on the testimony of Pro, who was also indicted and who had pleaded guilty to these charges and other similar charges in several other jurisdictions. He served his time and was on parole and in the witness protection program between the end of the first and the commencement of the second trial. During this period, his identity was protected by the federal government and he was permitted to trade in and control publicly held businesses. During this time he engaged in activities which led to a civil action by the Securities Exchange Commission and subsequent indictment and conviction.

The second trial was scheduled for May 17, 1982. Government again relied almost exclusively on the testimony of Pro who stated under cross examination and re-direct examination

that he was telling the truth and had done nothing fraudulent since he had been out of prison.

Pro was the only witness who testified as to the commission of this crime by Caggiano, stating *he assumed* Caggiano knew that he, Pro, was not going to do the upgrading. Caggiano testified he did not know Pro did not intend to go through with the upgrading. He also produced character witnesses who testified as to his good reputation.

On June 14, 1982, the jury found Caggiano not guilty on Counts 1, 2, 3, 4 and 7 which set out the scheme to defraud, wire fraud, and conspiracy. He was found guilty on Count 6 which charged transportation of money knowing the same to have been obtained by fraud. The defendant appealed.

In March 1983, during the pendency of the appeal, Caggiano learned that Pro had been indicted in the Western District of Texas for fraud, looting of corporate assets, violation of federal securities laws, falsification of records presented to the SEC, and defrauding the United States Department of Energy of $1,000,000; all these offenses were committed prior to the second trial. He was tried in June 1983, was found guilty, and is serving a 20-year sentence.

On June 1, 1982, the first day of Pro's testimony against Caggiano, Pro was served with a restraining order issued by the United States District Court, Western District of Texas. The order was served by U.S. Marshal Donnelly in the court house in Memphis.

This order detailed the fraudulent and other felonious conduct of Pro and formed the basis for his subsequent indictment. This restraining order was wired to the marshal in Memphis by the SEC through the San Antonio Marshal's office for service there.

Dycus was informed of this; he instructed Donnelly not to serve Pro until lunch break and withheld this information from the defendants, the court, and the jury. Under examination by

Dycus, Pro testified that he was telling the truth, that in testifying at this trial he had been truthful and candid, that he had not been involved in any criminal and fraudulent activities since he had been out of prison, that he would never commit another crime again and that he expected no reward or favorable treatment.

This testimony was false. In addition to the criminal conduct detailed in the restraining order, he told his partner in the Texas deal, Irving M. Drobny, during two telephone conversations on June 1, 1982, that he would have the lawsuit filed by the Securities Exchange Commission dismissed; that he was talking to the Assistant U.S. Attorney and the U.S. Marshal in Memphis and elsewhere; and that they were going to straighten that out, and they were going to call the SEC to have them drop the litigation.

The government suborned this perjury knowing full well that the entire case hinged on the credibility of Caggiano or that of Pro.

Pro testified that he assumed that Caggiano knew of the fraud. Caggiano denied knowledge or involvement in the scheme. Because of the death of Presley and the refusal of the judge to permit his former fiancee and companion to testify as to the defendant's trustworthiness and innocence, the defendant could only rely on his general reputation for truth and veracity. He offered character witnesses in his defense.

The jury was troubled by the case from the beginning. Before deliberation began, the foreman asked how to deal with a verdict which was not unanimous and they returned twice to report an inability to reach a verdict.

Both the defendant and the prosecutor asked the judge to instruct the jury under *Allen* that the jury hold to opinions conscientiously held. The judge refused to give further instructions except to tell the jury that they were to go back and report a verdict of guilty or not guilty.

Argument.

I. THE PETITIONER WAS DENIED A FAIR TRIAL WHEN THE JUDGE REFUSED TO INSTRUCT A CONFUSED AND A DEADLOCKED JURY THAT JURORS SHOULD NOT SURRENDER CONSCIENTIOUSLY HELD CONVICTIONS WHEN REQUESTED BY BOTH THE DEFENSE AND THE PROSECUTION BUT INSTEAD SENT THE JURY BACK WITH INSTRUCTIONS TO RETURN A GUILTY OR NOT GUILTY VERDICT.

This defendant briefed and argued the issue of coercion of the jury by the instructions and actions of the trial judge. The Court of Appeals did not address the issue in its opinion.

In *Jenkins* v. *United States*, 380 U.S. 445 (1965) this Court granted certiorari to consider the question of judicial coercion of the jury. The Solicitor General said in his brief that if the judge's statements were coercive then the judgment should be reversed. He went on to say that: ". . . the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration." 380 U.S. at 446.

The Court held that on a review of the record, the judge's statement to the jury was coercive and reversed the judgment and remanded the case for a new trial in a Per Curiam opinion.

In this case, after the judge instructed the jury, defense counsel objected to the instructions as being archaic, misleading, and depriving the defendants of the essence of a fair trial. The Court noted the exceptions and concurred with defense counsel that the instructions were difficult to understand.

The jury was obviously confused. Before the jury began deliberations, the foreman asked the court how the jury was to deal with any verdict which was not unanimous. The court did not respond to the foreman's question, but rather emphasized that in order to reach a verdict as to any defendant as to any count, it would be necessary that all of the jurors agree.

Defendant's counsel requested that the court give further instructions in response to the foreman's question and to instruct them that they should each hold firm to their own conviction, which the court refused to do.

During deliberations the jury returned twice to report that they were deadlocked on all counts as to this defendant. Government's counsel requested the court to instruct the jury to reach a verdict if they can without violence to their own individual conviction.

Defendant's counsel twice requested that the court instruct the jury to hold their own conviction which the court refused to do.

The jury was brought back less than an hour after being sent out the first time at which time the court instructed the jury that they should only report a guilty or a not guilty verdict and that the jury should not report in partial forms or indicate where the jurors stand with respect to any counts.

It is obvious that the jury was confused as to how to report on this case. The foreman showed his confusion when he asked the court how they should report in the event that they were not able to arrive at a unanimous decision. The court did not clarify the procedure, except to emphasize that they had to come back with a guilty or not guilty verdict. The court never informed the jury that in the event that they were unable to arrive at a unanimous decision on any particular count as to any particular defendant, the third option would be that they could remain deadlocked. The judge refused to help the jury even after defendant's counsel twice requested that the court instruct the jury to each hold firm to their own conviction and again to not do violence to their individual conscience and that they should remain firm in their own opinion if they should believe so. Further, the prosecutor also requested that the court instruct the jury to reach a verdict, if they can, without violence to their own individual conviction. In all three instances, the court refused to clear up the confusion.

The jury returned to deliberate and less than two hours later, they returned the ultimate guilty verdict on Count 6 as to this defendant in what is clearly a compromise verdict.

It is apparent from the record that the instructions from the court to "only report a guilty or not guilty" verdict had a coercive effect on the jury.

The questions raised in this petition have not been definitively addressed by the Supreme Court.

The right to trial by jury is protected by the Sixth Amendment. This right certainly includes the right to fair instructions and to jury deliberations which are free from judicial coercion. The defendant should also, when the jury is unable to agree, be entitled to a mistrial as an alternative to a guilty or not guilty verdict squeezed from the jury when cautious deliberation has not led to a verdict.

The question of when the *Allen* charge may be used with a jury that has expressed confusion and asked for guidance is not decided. The question of how the jury is to be informed that they should individually hold to a position conscientiously arrived at even if to do so results in a hung jury remains a difficult question for trial judges and appellate courts.

Judge J. Shelly Wright in his dissent in the Court of Appeals opinion in *Jenkins* v. *United States*, 330 F.2d 220, 222 (D.C. App. 1964) reminded the court that: "There is no requirement in law that a jury agree. As a matter of fact, a hung jury can be a safeguard to liberty."

Whether the federal constitution entitled the defendant to rely on the possibility of disagreement by the jury is an issue not clearly decided by the Supreme Court. It is a matter of pressing concern among the circuits with respect to the use of the *Allen* charge.

In this case the refusal of the trial judge to brook the prospect of yet a third trial resulted in such error as to deny a fair trial.

II. THE PETITIONER WAS DENIED A SPEEDY TRIAL AND A FAIR TRIAL WHEN AFTER LONG DELAYS, OBJECTED TO MANY TIMES, THE PRINCIPAL DEFENSE WITNESS, KNOWN TO BE SERIOUSLY Ill, DIES BEFORE TRIAL AND WHERE THE TRIAL JUDGE REFUSES TO EXERCISE HIS DISCRETION TO ADMIT EVIDENCE OF THE STATEMENTS OF THE UNAVAILABLE WITNESS ADMISSIBLE UNDER FRE 804(b)(3).

The defendant was indicted on October 13, 1977 and arraigned on November 7. Trial was set for March 27, 1978. The government requested a continuance and the trial date was advanced to August 14, and then to August 21, 1978 over the objection of the defendant who had reported on March 27 ready for trial.

Trial began on August 21, 1978 and on this date defendant learned that an important witness, Sidney Zneimer, who had been an integral part of this entire transaction, died on July 13, 1978.

On August 22, 1978, defendant filed a new motion to dismiss for lack of speedy trial due to the death of a material witness which motion was denied by the trial judge.

The first trial ended in a mistrial on September 11, 1978. On November 17, 1978, a superseding indictment was returned. Some counts were dropped and a defendant added. Retrial was scheduled for January 15, 1979.

Prior to the first trial, the attorney representing Vernon Presley refused to allow the defendant or his attorney to interview Presley because of his ill health.

Before the trial ended and after his video testimony, Presley sought out the defendant at his motel notwithstanding his ill health; he volunteered to testify on behalf of the defendant at the subsequent trial, should there be one. This testimony would be exculpatory. *The victim of the crime would testify that he had not been victimized by Caggiano and that Caggiano had done him no harm and that co-defendant Pro had been the culprit.*

The government knew of the critical medical disability of Presley and that his testimony would be exculpatory of the defendant, as was subsequently discovered in the tapes of an FBI interview of Presley taken on March 3, 1977, which the government failed to produce prior to or during defendant's trial of August 21, 1978, and by the contents of an unreported conversation that Beecher Smith had with the prosecutor on instructions from Vernon Presley.

Trial date on the superseding indictment was scheduled for January 15, 1979 and continued to April 2, 1979, at which time the defendant reported that he was ready for trial. On March 28, 1979, the court held a hearing concerning a request for continuance made by the co-defendant Baszner. The court granted a continuance over the written and oral objection of the defendant.

The trial date was set for July 30, 1979 and again continued to August 20, 1979.

On August 2, 1979, the defendant learned of the discovery by a co-defendant of the FBI tapes of an interview of Presley taken on March 3, 1977. This tape had been suppressed by the prosecutor during the first trial. *By this time, Presley was dead.*

On August 3, 1979, defendant filed a motion to dismiss based on government's failure to produce exculpatory material and renewed motion to dismiss for lack of speedy trial on the following grounds:

a. that the government withheld the tapes of an FBI interview of Presley taken March 3, 1977, exculpating the defendant pursuant to the requirements of *Brady* v. *Maryland*, 373 U.S. 83 (1963); and,

b. the death of Vernon Presley who had stated in the presence of witnesses that he would testify on behalf of defendant Caggiano at the second trial.

This motion was denied by the trial judge.

A motion to dismiss the indictment based on double jeopardy grounds was then filed, heard, and on August 15, 1979, denied. An appeal was taken and on August 16, the trial date was continued.

The case was argued before the Court of Appeals on June 4, 1980. On June 13, 1980, the judgment of the district court was affirmed. The defendant took no further action on the decision of the Appeals Court and stood ready for trial as soon as the mandate was received by the district court. Because Baszner filed a petition for a writ of certiorari, the mandate did not issue until October 8, 1980, and the trial date was set for January 5, 1981.

On December 5, 1980, defendant filed a renewed motion to dismiss for lack of speedy trial and adoption of motion to disqualify filed by co-defendant Baszner, to disqualify the office of the United States Attorney on conflict of interest grounds based on the fact that his attorney Phil M. Canale had accepted an offer of employment as an Assistant United States Attorney in the Office of the United States Attorney prosecuting the defendant. The interlocutory motion to disqualify was allowed on December 24, 1980, based on the exercise of the discretion of the trial judge to avoid the appearance of impropriety. The government filed a notice of appeal on December 31, 1980.

On September 17, 1981, the Court of Appeals reversed the trial court and ordered the case to trial. A rehearing en banc was denied and the defendant filed a timely petition for a writ of certiorari which was denied by the Supreme Court on February 22, 1982.

The case was scheduled for trial on May 17, 1982, more than four and one-half years after the indictment in this case.

On April 15, 1982, defendant filed motion to dismiss indictment on the grounds that the defendant has been denied his right to a speedy trial as guaranteed by the Sixth Amendment

to the United States Constitution and as provided by Title 18 U.S.C. § 3161. Defendant also filed affidavits of Sandra Miller, Ninetta Torra, and D. Beecher Smith, II, Presley's attorney, with regard to the statements made by Vernon Presley about the defendant Caggiano which were exculpatory, and which detailed the fact that Vernon Presley had planned to testify at defendant's second trial, and that as a result of court's continuance of the trial date from April 2, 1979 to August 20, 1979, the defendant lost a crucial witness in Vernon Presley, who died June 26, 1979.

The trial judge denied the motion to dismiss and trial commenced on May 17, 1982 as scheduled.

In *Dickey* v. *Florida,* 398 U.S. 30 (1970), the Supreme Court held that where the delay had caused actual prejudice to the accused as a result of the death of two potential witnesses then the accused was entitled to dismissal of the charges.

The constitutional right to a speedy trial was affirmed by the Supreme Court in *Barker* v. *Wingo,* 407 U.S. 514 (1972). In that opinion, the Court outlined four factors to be weighed in a judicial review of a motion to dismiss for violation of this Sixth Amendment right. They are the length of the delay, the reasons for the delay, the nature of the defendant's assertion of his speedy trial rights and the prejudice caused to the defendant as a result of the delay.

In this case the delay was over four years; the delay was caused in principal part by the prosecution; the defendant asserted his right to a speedy trial time and time again.

As for the prejudice caused by the delay, the defendant has been subjected to a high state of anxiety and concern as this case has lurched from crises to crises. The cost of the defense has been high and the demands on his time oppressive. His professional career has been tarnished and his ability to attract, hold, and service clients has been impaired. His health has been adversely affected. He and his family have suffered

humility and shame in their social and business contacts. The pendency of this case has undercut his ability to provide the financial support necessary to adequately educate his children.

Further, his defense suffered a shattering blow on the death of Vernon Presley, the alleged victim of the crime charged, an essential witness for defendant, who had promised to provide important exculpatory evidence should a retrial be necessary.

Not only did the defendant lose a most valuable witness as a result of the court's continuance of the trial from April 2 to August 20, 1979, over defendant's objection, but the defendant was further denied the right to have Presley's attorney and his fiancee offer testimony of what Presley would have testified about, had he been alive, and also Presley's attitude, understanding, and state of mind as to whether or not this defendant had victimized him in this transaction. The trial judge arbitrarily refused to let in testimony under 804(b)(3). The impact of this testimony on the jury can only be imagined; Presley was a well-known and highly regarded citizen of Memphis. His testimony was critical to the defense of this defendant.

The case dragged on from the end of the first trial in September 1978 until Presley died in June 1979, even though it was known by the government and the trial judge that Presley had important exculpatory testimony to give and that he was gravely ill.

The Court of Appeals in its per curiam opinion held that under the four-part balancing test of *Barker* v. *Wingo*, 407 U.S. 514 (1972), Caggiano's right to a speedy trial under the Sixth Amendment was not denied.

The conclusion of the court, lacking any analytical basis or factual references, that the balancing test required by *Barker* v. *Wingo* was not met is simply not supported by the facts or the law. A one-line rejection of serious constitutional questions involving the freedom and professional future of this defendant

is not an adequate judicial response. Litigants accused by the United States of criminal conduct are entitled to better than this under the facts of the case against Caggiano.

Furthermore, the court did not deal with the *Dickey* v. *Florida,* 398 U.S. 30 (1970), holding that a defendant is entitled to a dismissal where delay caused actual prejudice. Here the delay was highly prejudicial, essentially depriving Caggiano of a defense; yet the court simply fails to even acknowledge this constitutional issue.

This case presents several important *Barker* issues which were misapplied or misunderstood by the Court of Appeals. The prejudice suffered by the defendant ranged from personal to business and professional, to loss of a critical witness. These issues were preserved by the defendant and were briefed and argued on appeal.

The Sixth Amendment rights asserted herein were said by Chief Justice Burger in *Dickey* to be fundamental. 398 U.S. at 38. He also said that the delay in that case with its consequent prejudice was intolerable as a matter of fact and impermissible as a matter of law. *Id.*

These observations are also valid sixteen years later in this case.

The case presents the further issue that where the defendant had lost critical defense witnesses, was he denied due process by a judge who refused to permit evidence admissible under 804(b)(3) into the trial?

The defendant offered to prove through the testimony of Sandra Miller, Presley's fiancee and associate and through D. Beecher Smith II, his lawyer, that Presley had complete confidence in Caggiano, that he knew that Caggiano had written the lease, had made every effort to protect Presley, had warned Presley not to deal with Pro and fully understood that the necessary work on the jet had to be prepaid and that Caggiano

had committed no fraudulent and dishonest act during the entire transaction.

The interrelationship between the *Barker* and *Dickey* tests and the prejudice abating purpose of FRE 804(b)(3) presents an issue to this Court which has not been fully explored or even addressed.

III. The Petitioner Was Denied a Fair Trial When in a One-On-One Case Depending Entirely on Witness' Credibility the Prosecutor Introduces Perjured Testimony and Suppresses Evidence of Witness Bias and Then, Based on That Testimony Argues to the Jury that Its Witness is Worthy of Belief, and Whether on a Motion for New Trial Based on the Discovery of the Perjury He Is Entitled to a Factual Hearing.

The Court of Appeals failed to address the defendant's claim raised by his motion for new trial, and like Judge Wellford, the trial judge, conveniently looks right by the defendant's claim of error to make the whole issue turn on a subsidiary argument relying on *United States* v. *Bagley*, 53 U.S.L.W. 5084, 105 S.Ct. 3375 (1985). That case does not answer the defendants charges.

In *Bagley* the case was jury waived before a judge who found as a fact that his decision would not have been influenced by the suppressed evidence.

In this case the trial was before a jury already confused and uncertain of the defendant's guilt. This was a retrial after a hung jury based almost exclusively on the testimony of a convicted felon who had admitted prior perjury as well as a wide variety of fraudulent conduct. This was all revealed on direct and cross-examination.

The foreman of the jury anticipated a disagreement before deliberations began and asked for help from the judge. The jury returned twice to report problems and arrived at a com-

promise verdict only after being told by the judge to return a guilty or not guilty verdict.

Caggiano's claim is that the prosecutor was guilty of misconduct in suborning the perjurious testimony of the government's principal witness, in permitting untruthful evidence, known by the government to be untruthful, to remain before the jury uncorrected, in failing to apprise the defendant of the facts concerning the witness' conduct which could have effected the jury's assessment of the credibility of the witness and in arguing to the jury that based on Pro's reform, repentence and rehabilitation, that his testimony was worthy of belief while knowing full well that the testimony was essentially false and perjurious and given with the expectation of reward in his difficulties with the government in Texas.

In the case against Caggiano, this was a one-on-one situation. Pro testified that he assumed that Caggiano knew of his fraudulent intent and Caggiano testified that he did not know that any fraud was planned.

The government then sought to establish Pro's credibility by having him testify on redirect and that he was only interested that justice be done, that he expected no reward or favor, and that he had not committed any crime since the Presley incident for which he had served time in jail and that he had learned his lesson and was not going to commit any more criminal acts.

Having been deprived of Presley's testimony, Caggiano's defense was based solely on his credibility. He introduced character witnesses to vouch for his good character and reputation.

The only issue for the jury was the relative credibility of the two witnesses — the accusor or the accused. This presents an unusual, though simple issue for the jury. In this case the only evidence of criminal conduct against Caggiano came from the lips of Pro.

The failure to disclose, and the active suppression of the facts concerning the government's intensive investigation of Pro's conduct in Texas, the discovery of his fraudulent conduct, and the restraining order prevented the defendant from establishing that the witness did indeed expect a reward or favor from the prosecutor for his testimony against this defendant. Caggiano attempted to prove this in his request for an evidentiary hearing on his motion for a new trial supported by the affidavit of Pro's co-defendant Drobny to the effect that Pro said that he was going to straighten out his Texas problem with the U.S. Attorney's office in Memphis.

As in *United States* v. *Leja,* 568 F.2d 493 (6th Cir. 1977), where the witness testified that his motive was to combat a dirty business so also did Pro testify as to his noble motive.

The circumstances, if known to this defendant, could have established not only that the chief government witness was lying to the jury, but also his bias and motive to testify. The jury was entitled to know this and the suppression of the facts, known only to the government, was prejudicial and undermines confidence in the outcome of the trial. *United States* v. *Bagley,* 53 U.S.L.W. at 5086, 105 S.Ct. 3375 (1985).

The allegations of corrupt and willful suppression of the Pro misconduct, fully disclosed to the prosecutor just prior to his use as a witness, called for a full and complete evidentiary hearing; the use of that testimony during the trial and in closing argument called for summary reversal and severe sanctions. Instead, Judge Wellford summarily dismissed the new trial motion, protected Dycus, and excused this misconduct on the grounds that because of extensive cross-examination of Pro with respect to his known past crimes, there was no likelihood that an uncertain jury would reach a different result. The judge simply ignored the misconduct claims and the evidence offered to support these claims.

In fact, this kind of cross-examination without the ability to expose the contemporaneous perjury served only to enhance his credibility.

The finding of Judge Wellford, incredibly, was sustained by the Court of Appeals without even considering the gravamen of defendant's argument. The Court of Appeals merely whitewashes over the nonfeasence of the judge and the malfeasence of the prosecutor. *United States* v. *Bagley* does not offer refuge from this conduct, and the reliance on *Bagley* is misplaced and the holding exaggerated on the facts of this case.

The affidavits filed in the case detail the corrupt conduct of the prosecutor on matters which entitle Caggiano as a matter of constitutional law to a new trial.

The disposition of the motions and all of the factual allegations made in them and their supporting affidavits without a hearing, and summarily, was error declared to be so by the Court of Appeals in *Cain* v. *Smith,* 686 F.2d, 374 (6th Cir. 1982) where the court held at page 380:

> Summary judgment should not be granted where it appears, as it does on this fragmented record, that "the petitioner's allegations, if proved, would establish his right to relief." *Townsend* v. *Sain,* 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963). See *Jones* 590 F.2d at 686. [Footnote omitted.]

It should further be noted that the allegations of this defendant did not only sound in newly discovered evidence. The principal thrust of this defendant's motions was that the corrupt conduct of the representative of the United States denied him a fair trial.

The summary disposal of this issue was an abuse of discretion which has not been answered by the finding of Judge Wellford that the result would "probably" not have been different. *Bagley* requires a finding that the error was harmless beyond a reasonable doubt. *United States* v. *Bagley*, 53 U.S.L.W. at 5087, 105 S.Ct. 3375 (1985). This is not the standard applied by the Court of Appeals. Clearly the court misunderstood and misapplied the holding of the Court.

The issue is not whether the information would have made a difference if disclosed prior to the witness' testimony, but whether the jury would have been inclined to believe Pro if they had known that he sat on the witness stand before them and with the complicity of the United States Attorney lied to them with respect to his motive in testifying and as to his continued criminal activity which he looked to the prosecutor to forgive. He expected Dycus to bail him out of the mess in Texas and Dycus knew it.

The willingness of a trial judge and the Court of Appeals to condone and excuse this official misconduct is a dark stain on the judicial process which raises grave doubts as to the integrity of the trial. Indeed, the procedures adopted in this case have made these proceedings a mere pretense of a trial. The failure of the appellate court to correct the alleged errors committed by Judge Wellford, who both presided on the new trial motions and now sits on that court, raises questions which are not answered by a summary dismissal of constitutional claims that are admitted to be "not without difficulty."

The public is also entitled to know that the nauseous odor which rises from this case does not smell of official corruption.

This Court must protect the respect for the judicial process that the court was called upon to protect in *Jones* v. *Kentucky*, 97 F.2d 335 (6th Cir. 1938).

By this per curiam opinion the Court of Appeals simply sweeps under a rug, at the expense of this defendant and the whole judicial system, serious allegations of grave error which are admitted to be difficult questions calling upon the authority of *Bagley* to justify the conduct. This is a gross misuse of that case.

Conclusion.

It is respectfully requested that this Court issue its Writ of Certiorari so that the case may be briefed and the record may be reviewed.

Respectfully submitted,

EDWARD A. KIZER,
P.O. Box 2261,
Memphis, Tennessee 38101.
(901) 948-6304
Attorney for the Petitioner

Table of Contents.

Appendix A	Decision of United States Court of Appeals for the Sixth Circuit, 2/5/86	1a
Appendix B	Petition of Rehearing En Banc, 1/28/86	2a
Appendix C	Order on Jury Verdict, 6/15/82	3a
Appendix D	Verdict	7a
Appendix E	Affidavit of Sandra Miller	8a
Appendix F	Affidavit of Irving Drobny	14a

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 82-5573, 82-5587, 82-5598, 84-5488, 84-5906.

Filed Dec. 2, 1985, John P. Hehman, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NIGEL WINFIELD,
GABRIEL ROBERT CAGGIANO,
RAYMOND W. BASZNER,
Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Tennessee.

Before: ENGEL and MILBURN, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

PER CURIAM. Raymond W. Baszner, Gabriel Robert Caggiano, and Nigel Winfield appeal their jury convictions in the United States District Court for the Western District of Kentucky for interstate transportation of property and money taken by fraud and aiding and abetting the crime. The defendants also appeal from the district court's order denying their motions for a new trial on the basis of newly discovered evidence.

In October, 1977, Baszner, Caggiano and four other co-defendants were charged in a seventeen-count indictment with mail and wire fraud, interstate transportation of fraudulently obtained property and money, and conspiracy. At an August,

1978 trial on these charges, the jury convicted one defendant but failed to reach a verdict on any count against Caggiano and on eight of the counts against Baszner. The jury acquitted Baszner on one count of mail fraud and two counts of wire fraud. The court declared a mistrial concerning the counts of the indictment on which the jury had been unable to reach a verdict.

On November 17, 1978, a superseding indictment was returned against Baszner, Caggiano, a third original co-defendant named J. Laurence Wolfson, and a new defendant, Nigel Winfield. The new indictment charged these defendants with essentially the same counts, and did not contain any mail fraud charges or any of the charges on which Baszner had been acquitted. After several lengthy delays, the defendants went to trial in May, 1982. The jury acquitted each of the defendants on Counts 1, 2, 3, 4 and 7. However, it found Winfield and Wolfson guilty on Count 5 and Baszner and Caggiano guilty on Count 6. Those counts charged interstate transportation of property and money taken by fraud and aiding and abetting the crime. The defendants appealed these convictions.

While the appeals were pending, the defendants discovered evidence that Frederick Pro, a key government witness against them, had perjured himself at the trial. They moved the district court for a new trial based on this newly discovered evidence. A panel of our court granted a motion holding the appeals of their convictions in abeyance, pending resolution of the motions for new trial by the district court. On May 18, 1984, the district court entered an order denying the motions for new trial. Arguments concerning the denial of these motions have been consolidated with the appeals from the convictions.

On appeal the parties raise numerous issues. Winfield argues (1) that there is insufficient evidence to show that he knew that any checks had been taken by fraud, (2) that he was prejudiced by the improper admission in evidence of a check from

Trans World Industries to Ena Winfield, and (3) that the finding of not guilty on the conspiracy charge shows that the jury considered improper hearsay testimony in reaching the verdict of guilty on the substantive charge. Caggiano argues (1) that he was denied his right to a speedy trial, (2) that the trial court improperly excluded hearsay testimony concerning what Vernon Presley would have testified had he been alive at the time of the second trial, and (3) that he was denied due process when the trial court failed to give the jury an *Allen* charge or modified *Allen* charge. Baszner contends (1) that he is entitled to a new trial because the government violated the Jencks Act, (2) that it was prejudicial error to allow the prosecution to present the videotaped deposition of Vernon Presley, and (3) that the district court erred in holding that the government was not collaterally estopped from prosecuting the superseding indictment. All three defendants argue that the trial court erred in denying their motions for new trial based upon newly discovered evidence. The government contends that the court of appeals has no jurisdiction over the appeals of Winfield and Baszner from the denial of their motions for new trial because these defendants did not file timely notices of appeal.

Of the several issues presented by the defendants, the most serious are the claim by Caggiano that he was denied his constitutional right to a speedy trial and the claim of all the defendants that their right to a fair trial was fatally impaired by the government's failure to notify defense counsel of Frederick Pro's alleged fraudulent misconduct between the time of the first and the second trials.

With respect to the speedy trial issue, we note that this case was commenced before the effective date of the sanctions provision of the Speedy Trial Act. 18 U.S.C. § 3163 (1982). Therefore, we measure the circumstances here against the constitutional standards established by the United States Supreme Court in *Barker* v. *Wingo*, 407 U.S. 514 (1972). We conclude

that under the four-part balancing test of *Barker*, Caggiano's Sixth Amendment right to a speedy trial was not denied.

With respect to the assertion that the government wrongfully withheld information concerning Frederick Pro's more recent fraudulent activity, contrary to the principles set forth in *Brady* v. *Maryland*, 373 U.S. 83 (1963), we acknowledge that the issue is not without difficulty. Nevertheless, we are constrained to agree with the trial judge that there is no reasonable probability that had the information in question been disclosed to defense counsel, the result of the proceedings would have been different, *see United States* v. *Bagley*, 53 U.S.L.W. 5084 (U.S. July 2, 1985), especially given the extensive defense cross-examination going to the impeachment of Pro during the course of trial.

We find no merit to the other claims raised by the defendants. Accordingly, the judgment of the district court is AFFIRMED.

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By /s/_____
Yvonne Henderson
Deputy Clerk

ISSUED AS MANDATE: 2/5/86
COSTS: none

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5573/5587/5598, 84-5488

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NIGEL WINFIELD (82-5573),
GABRIEL ROBERT CAGGIANO (82-5587),
RAYMOND W. BASZNER (82-5598),
GABRIEL ROBERT CAGGIANO (84-5488),
Defendants-Appellants

FILED
Jan 28, 1986
JOHN P. HEHMAN,
Clerk

ORDER

BEFORE: ENGEL and MILBURN, Circuit Judges, and CELEBREZZE Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
John P. Hehman, Clerk

Appendix C.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA
VS 77-20201-04-W
GABRIEL ROBERT CAGGIANO

ORDER ON JURY VERDICT

This cause came on for trial on May 17, 1982, the United States Attorney for this District representing the government, and the defendant appearing in person and with counsel, Edward A. Kizer, retained by the defendant.

After listening to all of the evidence, arguments of counsel, and charge of the Court, the jury began its deliberations on June 11, 1982. After due deliberation, the jury returned into open court on June 14, 1982, and announced its verdict of GUILTY as to Count 6; and NOT GUILTY as to Counts 1, 2, 3, 4 and 7.

IT IS ORDERED that upon the jury verdict of not guilty, Counts 1, 2, 3, 4 and 7 are hereby dismissed.

The case is to be set for disposition at a later date upon completion of the presentence report, and in the meantime, the defendant may remain on his present bond.

ENTERED this 15th day of June, 1982.

/s/_____
HARRY W. WELLFORD, JUDGE
UNITED STATES DISTRICT COURT

APPROVED: /s/ Joe A. Dycus
ASSISTANT UNITED STATES ATTORNEY

FILED Jun 15, 3:02 p.m. '82
This document entered on docket sheet in compliance with Rule 55 and/or 32(b) FRCrP on 6-15-82

Appendix D.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA
VS CR 77-20201
GABRIEL ROBERT CAGGIANO

VERDICT

We, the jury, on the issues joined for our verdict say:
We find the defendant GABRIEL ROBERT CAGGIANO
as to Count 1. Not Guilty
(guilty or not guilty)

as to Count 2. Not Guilty
(guilty or not guilty)

as to Count 3. Not Guilty
(guilty or not guilty)

as to Count 4. Not Guilty
(guilty or not guilty)

as to Count 6. Guilty
(guilty or not guilty)

as to Count 7. Not Guilty
(guilty or not guilty)

as charged in the Indictment.

/s/
Hearsey S. Fennell Jr.
Foreperson

14 June 1982
DATE

Appendix E.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA
V. No. CR-77-20201
GABRIEL ROBERT CAGGIANO, Defendant

AFFIDAVIT OF SANDRA MILLER

I, Sandra Miller of Westminster, Colorado, formerly of Memphis, Tennessee do hereby state under oath that:

I had known Vernon Presley for a number of years well before 1976, right up until the time of his death in June, 1979. I was Vernon Presley's fiancee and personal confidant and, as per Vernon Presley's instructions, I was appointed executrix of his estate after his death.

During the span of time 1973-1979, I was very close to Vernon Presley. I performed some basic routine-type duties, such as answering telephone, taking care of correspondence, filing, etc. Additionally, Vernon Presley would from time to time confide in me and discuss some of the business transactions in which he was involved in his own behalf and on behalf of his son, Elvis A. Presley.

During the period of May, 1976 Vernon Presley found it necessary to put to use Elvis' Jetstar and looked into the possibility of selling, leasing back, and subleasing said aircraft to an airline for a financial benefit. After some preliminary negotiations, on or about the last week of June, 1976 Vernon Presley agreed to sell the Jetstar to W.W.P. Leasing of New York (Hans Achtmann), which in turn, financed the aircraft with Chemical Bank of New York and then leased it back to Elvis A. Presley. Vernon Presley then subleased the aircraft

to Air Cargo Express of Florida, which was Frederick Pro's company, and payments were made to Mr. Presley by Mr. Pro for the first and last payment according to the sublease agreement.

Vernon Presley told me about all the people he had met in connection with this transaction and specifically about Bob Caggiano, the attorney from Boston who represented World Aircraft Exchange which engaged Hans Achtmann to do the financing. Mr. Presley told me how much he appreciated the fact that Bob Caggiano, who was there for the interest of World Aircraft Exchange, ended up writing the contract with Mr. Davis in Mr. Davis' office and spent so much time with Mr. Davis to satisfy the requirements of the bank in writing the lease agreement, in delivering all documents to Mr. Hans Achtmann in New York, and how Mr. Caggiano devoted much time to conclude the transaction to the satisfaction of the Chemical Bank. Mr. Charles Davis was attorney for Vernon and Elvis A. Presley.

Vernon Presley discussed with me how Mr. Caggiano and Mr. Davis, to protect Mr. Presley, had decided to come up with an addendum to the lease which would provide for supervision and acceptance of work before the money would be paid by Mr. Achtmann. Mr. Presley liked those provisions and was grateful to Messrs. Caggiano and Davis.

While Messrs. Caggiano and Davis were working on some changes in the lease and addendum, Mr. Presley learned from his bank that the checks given to him by Mr. Pro under the terms of the sublease agreement had bounced and Mr. Presley began to get suspicious of Frederick Pro. Mr. Presley then said to me, "I'll have Mr. Davis show these checks to Mr. Caggiano and see what he has to say about Mr. Pro."

Vernon Presley came home and said that when Mr. Davis showed to Mr. Caggiano Mr. Pro's bounced checks, Mr. Caggiano said to Mr. Davis and Mr. Presley, "that Frederick Pro

is no good; he has given me and other people bogus checks. Mr. Presley, I wouldn't do business with Frederick Pro if I were you. Why not lease the plane to Federal Express or some other airline instead of Mr. Pro?" According to Mr. Presley, he informed Mr. Caggiano that he wanted to do this deal with Mr. Pro because he believed Mr. Pro, felt that he was only having temporary financial problems, that he would be alright, and a commitment had already been made and Mr. Presley always lived up to his commitments. Mr. Presley told me that his conclusion was that Bob Caggiano was not representing Mr. Pro, was not part of Mr. Pro's company as a result of the statements Mr. Caggiano had made about Mr. Pro. Mr. Presley added that he trusted Mr. Caggiano as he trusted Mr. Hans Achtmann.

On July 15, 1976 Vernon Presley received a call from Mr. Caggiano who explained that Mr. Hans Achtmann would no longer go along with the provisions of the addendum and that he, Mr. Caggiano, was looking for instructions from Mr. Presley as to what he should do with the entire matter. Mr. Presley told Mr. Caggiano over the telephone, in my presence, to take the check for the upgrading from Mr. Achtmann or Chemical Bank, and bring it to Memphis and that he, Mr. Presley, would handle everything himself. I heard Mr. Presley say, "Bob, bring that check to me personally and don't give it to anybody else."

On July 16, 1976 Vernon Presley went to the airport to meet Mr. Caggiano and to get the check from Chemical Bank. He subsequently made the necessary payments to commence doing the upgrading and looked to Mr. Pro to live to the terms of the sublease agreement. Mr. Presley told me that Mr. Caggiano had never made any representations to Vernon Presley that any work had been done on the Jetstar at this time or any other time. Mr. Presley also told me that Mr. Pro had made his checks good.

Mr. Presley became very upset with Mr. Pro when Mr. Pro didn't live up to the terms of the sublease agreement. Mr. Pro had sent checks to Mr. Presley for payment under the terms of the sublease agreement which bounced again and later he stopped making payments altogether.

Some time later, Mr. Presley told me he had contacted Mr. Caggiano to assist in the financing of Elvis' Falcon. Mr. Caggiano, we learned, had a letter of commitment for 50 percent financing and was looking to obtain participation from another bank when we were told that due to commitments to and from Andy Mannarino, Mr. Caggiano was unable to finance the said plane at this time. Mr. Caggiano advised Mr. Presley not to lease the Falcon to Mr. Pro and again suggested that Mr. Presley lease the aircraft to some other airline which Mr. Presley did not want to do. Mr. Caggiano then attempted to have Mr. Presley trade the Falcon and had a Mr. Web Thomas of Dallas, Texas come to Memphis for the trade. The deal was not finalized.

Mr. Presley never knew anything about Mr. Caggiano's indictment until we saw it announced in the newspaper. Mr. Presley could not believe that Bob Caggiano had been indicted and told me he could not understand why.

At some time during the month of September, 1978, while having dinner at "Pete and Sam's" restaurant at the Travel Lodge Motel, Memphis Airport, I met Mr. Caggiano whom Vernon Presley had talked about so many times, and with whom I had spoken on the telephone on occasions.

Mr. Presley called Bob Caggiano over to our table, and in my presence and that of my daughter and her friend, expressed his regrets for what had happened to Mr. Caggiano in connection with the trial in Memphis. Vernon said to him, "Bob, this is a terrible thing they have done to you, and I want you to know I had nothing to do with it; Bob, you have done me no harm and shouldn't even be here." Mr. Caggiano said to Mr.

Presley that he had been charged with a crime for having defrauded Elvis A. Presley, to which Vernon answered. "Bob, you didn't commit any crime; you tried to protect me in this transaction. It was that Frederick Pro that took the money and didn't do what he was supposed to do to the plane. I am going to send my man, Beecher Smith, down to see the Assistant U.S. Attorney, Mr. Dycus and tell them you just wrote the contract. I feel so bad that I want to do whatever I can to help you."

Mr. Presley then asked Mr. Caggiano to introduce him to the lady that was sitting at his table, which he did. Mr. Caggiano introduced Miss Torra to Mr. Presley and to the rest of us at our table.

After the introduction, Mr. Presley again said, "Bob, I want to help. You can rest assured I'll do what I can to help you and I'll send Beecher Smith to see Mr. Dycus to straighten this whole thing out and I'll testify for you, if necessary. Miss Torra was present when Mr. Presley made this statement.

Mr. Presley discussed this case with me many times after that. He personally told me that he didn't look to Bob Caggiano for any upgrading because Mr. Caggiano never made any representations to him concerning the airplane or the upgrading and that he would testify to that fact. Mr. Presley told me he would further testify that Mr. Caggiano had told him not to trust Mr. Pro and not to do business with him, but Mr. Presley said he had to do it because there was a benefit to Elvis, and further that Mr. Pro had a good background and that he was just having some financial problems at the moment but he felt that Mr. Pro would recover from that.

Mr. Presley told me how Mr. Caggiano informed him that the lease between the bank and Mr. Presley was to have an addendum which would provide for supervision and acceptance of work before the money would be paid. Mr. Presley added that he wanted to follow Mr. Caggiano's advice, but that when

the leasing company did not want to be responsible for the payment as the work would be done, Mr. Presley felt he could, and wanted to, trust Mr. Pro; it was his choice.

Mr. Presley said that Bob Caggiano never told him that the work had been done because he knew it had not. That was none of Mr. Caggiano's responsibility anyway. Mr. Presley further said that all Mr. Caggiano did was write a contract and that he would testify in Caggiano's behalf at the second trial, if there were going to be one.

After the conclusion of the first trial and prior to the second trial date scheduled for April 2, 1979, Mr. Presley had a telephone conversation with Mr. Caggiano and informed him he would keep his word and testify in his behalf at the upcoming trial.

Signed under the pains and penalties of perjury this 30th day of March, 1982.

/s/ _____

Sandra Miller
4860 W. 102nd Place
Westminster, Colorado

Then personally appeared Sandra Miler who acknowledged the foregoing to be her own free act and deed this 30th day of March, 1982 before me

/s/ _____

Keven K. Catalano
Notary Public
My Commission Expires

Appendix F.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA
VS NO. CR-77-20201
GABRIEL ROBERT CAGGIANO

AFFIDAVIT OF IRVING DROBNY

I, Irving Drobny of Glencoe, Illinois, first being duly sworn, do depose and say as follows:

1. On Tuesday afternoon, June 1, 1982, I received a call from Fred Deveau who said he was in Memphis, Tennessee testifying as an undercover agent for the United States Government. We had a discussion about the recently filed Security and Exchange Commission suit against Jet Industries and he stated that he would call me back later in the day.

2. On late afternoon or early evening of June 1, 1982, I believe Mr. Deveau called me and a further discussion was had wherein in substance he stated as follows:

A. That he would have the lawsuit filed by the S.E.C. dismissed.

B. That he was talking to the Assistant U.S. Attorney and the U.S. Marshall in Memphis and I believe elsewhere.

C. That they were going to straighten that out and they were going to call the S.E.C. to have them drop the litigation.

D. He also said that the attorneys in the S.E.C. would be reprimanded for blowing his cover. I quipped that he was a hero in Memphis and a scoundrel in Texas.

The foregoing is the general terms of the conversation on that date. Further, Mr. DeVeau called me on Friday, June 4, 1982 and stated that he would be flying into Chicago and wanted to see me. I met him on the evening of June 4, 1982 and on Saturday morning of June 5, 1982 in the presence of my attorney, Mr. William Gleeson wherein we discussed the S.E.C. suit and all matters surrounding it in a general fashion. He stated that he was going on to New York to see his attorney, Mr. Sussman, so that the entire matter would be resolved.

I, Irving M. Drobny do state that the foregoing statements contained in the above affidavit are true and correct to the best of my knowledge and belief.

/s/ _____
IRVING M. DROBNY

SUBSCRIBED and SWORN TO BEFORE ME on this the 20th day of March, 1984, to certify which witness my hand and seal of office.

/s/ _____
Karen L. Knapp
Notary Public
State of Texas